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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALYESKA PIPELINE SERVICE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
ARCO PIPE LINE COMPANY,
BP PIPELINES INC.,
EXXON PIPELINE COMPANY,
MOBIL ALASKA PIPELINE COMPANY,
PHILLIPS ALASKA PIPELINE CORPORATION,
SOHIO PIPE LINE COMPANY and
UNION ALASKA PIPELINE COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

QUINN O'CONNELL *
ERNEST C. BAYNARD, III
CONNOLE AND O'CONNELL
One Farragut Square South
Washington, D.C. 20006
(202) 347-8300

HARRY G. BRELSFORD
ALFRED T. SMITH
ALYESKA PIPELINE SERVICE COMPANY
1835 South Bragaw Street
Anchorage, Alaska 99512
(907) 265-8221

* *Counsel of Record*

QUESTIONS PRESENTED

Section 2517(b) of the judicial code (28 U.S.C. § 2517(b)) was amended in 1978 to provide the former Court of Claims, now the United States Claims Court, with the jurisdiction to enter partial final judgments against the United States. The court below entered a partial final judgment for Petitioners on their first claim pursuant to 28 U.S.C. § 2517(b) (Supp. V 1981), as so amended; however, the court subsequently, *sua sponte*, held that Petitioners had split a cause of action between the first claim and the third claim in the same lawsuit, and ordered Petitioners' third claim dismissed as barred by the partial final judgment on the first claim. The questions presented are:

1. Whether the jurisdiction to enter partial final judgments against the United States, pursuant to 28 U.S.C. § 2517(b), as amended, applies to all judgments of the United States Claims Court, or just to judgments entered in cases decided under the Contract Disputes Act of 1978.

2. If 28 U.S.C. § 2517(b), as amended, provides general authority to enter partial final judgments against the United States, whether the court below was correct in holding that a partial final judgment on one claim, entered and paid pursuant to that statute, bars as *res judicata* another claim in the same case.

3. Whether the court below denied Petitioners' procedural due process by *sua sponte* dismissing Petitioners' third claim on the basis of a split cause of action.

PARTIES

The parties to the proceeding in the United States Court of Claims, and subsequently the United States Court of Appeals for the Federal Circuit, whose judgment is sought to be reviewed, are all listed in the caption of this case in this Court. Pursuant to Rule 21.1(b) and Rule 28.1 of the Supreme Court of the United States, the parents, subsidiaries (except wholly

owned subsidiaries) and affiliates of each Petitioner are as follows:

Alyeska Pipeline Service Company is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipeline Company, and Union Alaska Pipeline Company; Amerada Hess Pipeline Corporation is wholly owned by Amerada Hess Corporation; ARCO Pipe Line Company is wholly owned by Atlantic Richfield Company; BP Pipelines Inc. is wholly owned by BP North America Inc., which is wholly owned by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd., which is wholly owned by The British Petroleum Company Limited; Exxon Pipeline Company owns an interest in Dixie Pipeline Company, Plantation Pipeline, Qualbank, Inc., West Shore Pipe Line Company, and Yellowstone Pipe Line Company and is wholly owned by Exxon Corporation; Mobil Alaska Pipeline Company is wholly owned by Mobil Oil Corporation, which is wholly owned by Mobil Corporation; Phillips Alaska Pipeline Corporation is wholly owned by Phillips Investment Company; Sohio Pipe Line Company is wholly owned by the Standard Oil Company (an Ohio corporation) in which a controlling interest is held by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd., which is wholly owned by The British Petroleum Company Limited; and Union Alaska Pipeline Company is wholly owned by Union Oil Company of California.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION OF THIS COURT	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. Whether the United States Claims Court has general jurisdiction to enter partial final judgments against the United States is an important question of federal law which has not been, but should be, settled by this Court	4
II. The proceedings below so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	8
CONCLUSION	9
APPENDIX:	
Opinion and Judgment of the United States Court of Claims in *Alyeska Pipeline Service Co. v. United States*, 688 F.2d 765 (Ct. Cl. 1982)	1a
Alyeska Pipeline Service Co. v. United States, No. 384-78 (Ct. Cl. March 6, 1981) (Order denying Defendant's motion to modify partial judgment)	12a
Alyeska Pipeline Service Co. v. United States, No. 384-78 (U.S. Ct. App. Fed. Cir. December 15, 1982) (denial of petition for rehearing with suggestion for rehearing en banc)	15a

TABLE OF AUTHORITIES

Page

CASES:

Alyeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct. Cl. 1980) 3

Alyeska Pipeline Service Co. v. United States, 688 F.2d 765 (Ct. Cl. 1982) 1,8

Electric Boat Co. v. United States, 81 Ct. Cl. 361 (1935), *cert. denied*, 297 U.S. 710 (1936) 8

Everett Plywood Corp. v. United States, 206 Ct. Cl. 224, 512 F.2d 1082 (1975) 8

International Curtis Marine Turbine Co. v. United States, 74 Ct. Cl. 132, 56 F.2d 708 (1932) 8

Jefferson Fourteenth Associates v. Wometco de Puerto Rico, Inc., 695 F.2d 524 (11th Cir. 1983) 8

Nager Electric Co. v. United States, 177 Ct. Cl. 234, 368 F.2d 847 (1966) 8

United States v. Erika, Inc., 456 U.S. 201 (1982) 5

United States v. King, 395 U.S. 1 (1969) 5

United States v. Sherwood, 312 U.S. 584 (1941) 5

United States v. Testan, 424 U.S. 392 (1976) 5

STATUTES:

28 U.S.C. § 1254(1) (1976) 2

28 U.S.C. § 2517(b) (1976) 6

28 U.S.C. § 2517(b) (Supp. V 1981) 2,3,4, 6,7,9

28 U.S.C. § 2517 (Supp. V 1981), *as amended by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 139(k), 96 Stat. 25, 43 (1982) 2,6

Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978) (codified as amended in scattered sections of 5, 28, 31 and 41 U.S.C.) 5,6,7

Tucker Act, 28 U.S.C. §§ 1346, 1491 (1976 & Supp. V 1981) and *as amended by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 129, 133(a), 96 Stat. 25, 39 (1982) 5

LEGISLATIVE HISTORY:

S. REP. NO. 1118, 95TH CONG., 2D SESS., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235 5,6

IN THE

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OCTOBER TERM, 1982

ALYESKA PIPELINE SERVICE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
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SOHIO PIPE LINE COMPANY and
UNION ALASKA PIPELINE COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion and judgment of the Court of Claims, *Alyeska Pipeline Service Company v. United States,* 688 F.2d 765 (Ct. Cl. 1982), and the order of the United States Court of Appeals for the Federal Circuit denying a petition for rehearing appear in the Appendix to this petition.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Claims in this case was rendered and entered on September 8, 1982. On October 1, 1982, the United States Court of Claims was abolished and, in its stead, the United States Claims Court and the

United States Court of Appeals for the Federal Circuit were created. A Petition for Rehearing was filed in the United States Court of Appeals for the Federal Circuit on October 22, 1982. That petition was denied on December 15, 1982.[1] This petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1976).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2517 (Supp. V 1981) provides:

> (a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.[2]
>
> (b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

STATEMENT OF THE CASE

Petitioners own and operate the Trans-Alaska Pipeline System. In 1978, pursuant to 28 U.S.C. § 1491 (1976), Petitioners filed an action in the United States Court of Claims to

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[1] Appendix at 15a. Five of the eleven judges recused themselves making it necessary to have the eligible judges vote unanimously to obtain a rehearing.

[2] Effective October 1, 1982, 28 U.S.C. § 2517 was amended by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 130(k), 96 Stat. 25, 43 (1982), substituting "United States Claims Court" for "Court of Claims."

recover monies that they alleged had been illegally exacted from them by the Department of the Interior in the course of issuing a right-of-way for the Trans-Alaska Pipeline System and in monitoring the construction and operation of that pipeline. The first amended petition filed in the court contained three claims for relief. The first claim was for all money collected from Petitioners by the Department of the Interior for administrative costs incurred in processing Petitioners' application for a right-of-way. The second claim was for the money collected by the Department of the Interior for the cost incurred in preparing the environmental impact statement, which had been prepared prior to the issuance of the Right-of-Way Grant. The third claim was for money collected from Petitioners by the Department of the Interior for certain costs of monitoring pipeline activities incurred after issuance of the Right-of-Way Grant.

Petitioners filed a motion for partial summary judgment on the first two claims. The Court of Claims granted Petitioners' motion for partial summary judgment on the first claim, which mooted the second claim. *Alyeska Pipeline Service Co. v. United States,* 624 F.2d 1005 (Ct. Cl. 1980). The judgment for the first claim was entered for payment pursuant to 28 U.S.C. § 2517(b) (Supp. V 1981), which had just been amended in 1978 to authorize the entry and payment of partial final judgments against the United States.

The United States filed a motion for relief from judgment, alleging that the entire case would be discharged if a final judgment were entered and paid. The United States argued that the 1978 amendments to 28 U.S.C. § 2517(b) did not authorize partial final judgments in non-contract cases. On March 6, 1981, the court denied Respondent's motion for relief from judgment and held that section 2517(b), as amended in 1978, applied generally to all Tucker Act cases in that court "and that the exclusionary provision of § 2517(b) prevents that partial judgment from discharging plaintiff's [*sic*] entire case." *Alyeska Pipeline Service Co. v. United States,* No. 384-78 at 3 (Ct. Cl. March 6, 1981) (Order denying Defendant's motion to modify partial judgment) (hereinafter cited as "Order"),

Appendix at 14a. The partial final judgment was subsequently paid.

On March 23, 1981, Petitioners filed a motion for leave to file an amended petition, which increased the damages sought in the third claim to include all of, instead of merely a portion of, the monitoring costs paid after the Right-of-Way Grant had been issued. In their response, attorneys for the United States said that they had no objection to the motion for leave to file an amended petition being granted. The motion was granted, and on April 1, 1981, the petition was filed.

The United States filed a motion for partial summary judgment on Petitioners' third claim, asserting that on the merits the third claim should be dismissed. Petitioners filed an opposition to that motion and a cross-motion for summary judgment.

At oral argument the court, *sua sponte*, questioned whether Petitioners had split a cause of action between the first claim, which had been the subject of the previous partial final judgment, and the third claim, which was then before the court. In the opinion and judgment of September 8, 1982, the court held that Petitioners had so split a cause of action[3] and that Petitioners' third claim was barred by the earlier partial final judgment on the first claim.

REASONS FOR GRANTING THE WRIT

I. Whether the United States Claims Court has general jurisdiction to enter partial final judgments against the United States is an important question of federal law which has not been, but should be, settled by this Court.

The extent to which the United States has consented to be sued under the broad waiver of sovereign immunity known as

[3] It is Petitioners' view that the separate claims in this case did not give rise to a split cause of action. However, for purposes of determining the scope of 28 U.S.C. § 2517(b), it can be assumed, *arguendo*, that a split cause of action is involved.

the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1976 & Supp. V 1981),[4] has always been considered important by this Court. For example, in *United States v. King*, 395 U.S. 1 (1969), the Court granted a petition for a writ of certiorari to consider whether the United States had consented to the entry of declaratory judgments in the United States Court of Claims. In *United States v. Sherwood*, 312 U.S. 584 (1941), this Court decided whether, in an action under the Tucker Act in a United States District Court, issues between plaintiffs and third parties could be adjudicated. In *United States v. Testan*, 424 U.S. 392 (1976), this Court decided whether the Court of Claims could enter a judgment remanding to the Civil Service Commission a case seeking retroactive promotion. In *United States v. Erika, Inc.*, 456 U.S. 201 (1982), this Court decided whether the Court of Claims had jurisdiction under the Tucker Act to review determinations by private insurance carriers of the amount of benefits payable under Part B of the Medicare program.

This case is one of first impression and presents a question just as important as those presented in *United States v. Testan, United States v. King, United States v. Sherwood* and *United States v. Erika, Inc.* In amending 28 U.S.C. § 2517(b), did Congress consent generally to the entry and payment of partial final judgments against the United States in all Tucker Act cases in the United States Claims Court, or did Congress merely consent to the entry and payment of such judgments in cases brought under the Contract Disputes Act of 1978[5]?

The Contract Disputes Act was intended to provide a more efficient dispute-resolving procedure in the procurement process. Congress specifically sought to provide a flexible system of alternative remedies whereby a contractor could split a cause of action. The Contract Disputes Act

> repeals the present rule against splitting of causes of action which require [*sic*] that all claims under a

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[4] In 1982, 28 U.S.C. §§ 1346 and 1491 were amended by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 129, 133(a), 96 Stat. 25, 39, to refer to "The United States Claims Court" instead of the "Court of Claims."

[5] Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended in scattered sections of 5, 28, 31 and 41 U.S.C.).

> single contract be brought before the court in one action and disposed of in one action.

S. Rep. No. 1118, 95th Cong., 2d Sess. 30-31, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5264-65.

It would have been a futile gesture, however, for Congress to provide for flexible, alternative remedies allowing a contractor to split his cause of action without amending 28 U.S.C. § 2517(b) (1976), the section of the judicial code that prescribes the effect of the payment of Claims Court judgments.

Prior to 1978, the judicial code provided that:

> Payment of any [final judgment rendered by the United States Court of Claims[6]] and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy.

28 U.S.C. § 2517(b) (1976).

Thus, this section had to be amended to allow the splitting of a cause of action. Otherwise, a partial final judgment on one claim would discharge any remaining claims arising under the same contract and the intended beneficial effects of the Contract Disputes Act would be negated. Accordingly, section 14(f) of the Contract Disputes Act added at the end of 28 U.S.C. § 2517(b) the clause:

> unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

Prior to its amendment, 28 U.S.C. § 2517(b) applied to all cases in the Court of Claims, whether or not they involved contract disputes. There is nothing in the amended provision to indicate that the section is no longer applicable to all Court of Claims, now Claims Court, cases. Whether this section now applies only to judgments in Contract Disputes Act cases or,

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[6] Effective October 1, 1982, 28 U.S.C. § 2517 refers to judgments of the United States Claims Court, the successor court to the Trial Division, United States Court of Claims.

generally, to all United States Claims Court judgments has been answered both ways by the same court, in two different opinions in this case.

On March 6, 1981, the court held that the problem of not having the jurisdiction to enter partial final judgments

> has been a general and troubling one in this court, and we understand Congress to have met that general problem by a general provision applicable to all of our cases.

Order at 3, Appendix at 14a.

Despite the March 6, 1981 holding that it had jurisdiction to enter partial final judgments pursuant to 28 U.S.C. § 2517(b) (Supp. V 1981), a year and a half later, the court below held that Petitioners' third claim in the same case was barred by the earlier partial final judgment on the first claim. Petitioners' third claim was for different amounts, paid at different times, to reimburse Respondent for different activities than in the first claim and undeniably was not one of the "matters described" in the earlier partial final judgment. If 28 U.S.C. § 2517(b) (Supp. V 1981) is applicable, Petitioners' third claim could not have been barred by the earlier partial final judgment.

Because the decisions and judgments of the United States Claims Court are reviewable solely in the United States Court of Appeals for the Federal Circuit, there never will be a conflict between two or more federal courts of appeal over whether 28 U.S.C. § 2517(b) applies to all Claims Court cases or just to Contract Disputes Act cases. Nevertheless, this issue is an important one. The former Court of Claims had, and now the United States Claims Court has, jurisdiction over all non-tort cases that seek money damages from the United States. The issue presented by this case is likely to arise in any of those cases that have multiple claims, except for Contract Disputes Act cases to which 28 U.S.C. § 2517(b)(Supp. V 1981) would unquestionably apply.

II. The proceedings below so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In the court below, the parties had filed cross motions for summary judgment and had fully briefed the substantive issues presented by Petitioners' third claim. Neither party raised the issue of whether Petitioners had split a cause of action.

The court announced *sua sponte* at oral argument that it appeared that Petitioners may have split a cause of action, thus barring their third claim. Although Petitioners were allowed to file hastily prepared post-argument memoranda, Petitioners never knew why the court viewed the cause of action as split until the court in this case issued its opinion and entered its judgment on September 8, 1982.

Relying on the "needs of judicial administration" and the "proper functioning of the judicial process," 688 F.2d at 771, Appendix at 10a, the court below *sua sponte* held in that opinion that Petitioners had split a cause of action and dismissed Petitioners' third claim. A *sua sponte* dismissal, under these circumstances, deprived Petitioners of procedural due process as the United States Court of Appeals for the Eleventh Circuit held in *Jefferson Fourteenth Associates v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983).

A year and a half before the court dismissed Petitioners' third claim, Petitioners had amended their pleadings to increase the amount of the damages sought in the third claim. This amendment, which the court ultimately found to be fatally offensive, had not only been allowed by the trial judge, but also Respondent had stated in writing that it did not oppose the amendment.

The court did not distinguish this case from its decisions[7] over the last fifty years that have consistently emphasized that if

[7] International Curtis Marine Turbine Co. v. United States, 74 Ct. Cl. 132, 137-38, 56 F.2d 708, 710 (1932); Electric Boat Co. v. United States, 81 Ct. Cl. 361, 367-68 (1935), *cert. denied*, 297 U.S. 710 (1936); Nager Electric Co. v. United States, 177 Ct. Cl. 234, 245-46, 368 F.2d 847, 855 (1966); Everett Plywood Corp. v. United States, 206 Ct. Cl. 244, 252, 512 F.2d 1082, 1087 (1975).

a plaintiff amends his pleadings to include all of his claims in one lawsuit, he will not have split a cause of action. Nor did the court below, in dismissing Petitioners' third claim, explain why 28 U.S.C. § 2517(b) (Supp. V 1981) did not apply — a significant omission in view of its holding, a year and a half earlier in this same case, that section 2517(b) did apply. Although the doctrine of *stare decisis* has its limitations, a litigant is entitled to rely upon some consistency of decision within the same case.

The "needs of judicial administration" and the "proper functioning of the judicial process" do not justify what the court below did in this case. The action by the court below is a marked departure from the usual course of judicial proceedings and calls for this Court to exercise its power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

QUINN O'CONNELL*
ERNEST C. BAYNARD, III
CONNOLE AND O'CONNELL
One Farragut Square South
Washington, D.C. 20006
(202) 347-8300

HARRY G. BRELSFORD
ALFRED T. SMITH
ALYESKA PIPELINE SERVICE COMPANY
1835 South Bragaw Street
Anchorage, Alaska 99512
(907) 265-8221

* *Counsel of Record*

DATED: March 15, 1983

IN THE

United States Court of Claims

No. 384-78

(Decided September 8, 1982)

ALYESKA PIPELINE SERVICE COMPANY, ET AL.
v. THE UNITED STATES

Quinn O'Connell, attorney of record, for plaintiffs. *Ernest C. Baynard III, Maryann Armbrust,* and *Connole and O'Connell,* of counsel.

Janice Siegel, with whom was *Assistant Attorney General Carol E. Dinkins,* for defendant; *Steven A. Herman,* attorney of record. *Marcia Lipson,* Department of the Interior, of counsel.

Before FRIEDMAN, *Chief Judge,* COWEN, *Senior Judge,* and DAVIS, *Judge.*

ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge,* delivered the opinion of the court:

This case is a sequel to *Alyeska Pipeline Service Co. v. United States,* 224 Ct. Cl. 240, 624 F.2d 1005 (1980) *("Alyeska I").* There we held that the plaintiffs were entitled to recover fees paid to reimburse the government for its expenses in processing the plaintiffs' application for a permit to construct the trans-Alaska oil pipeline. The primary ground of our decision was that the governing legislation authorized the Secretary of the Interior to obtain such reimbursement only if he acted pursuant to an authorizing regulation, and that since he had not promulgated such a regulation until June 1975, he lacked authority to obtain reimbursement for the period there involved, i.e., through September 30, 1973.

In the present case, the plaintiffs seek recovery of similar fees they paid to the Secretary for the period from October 1, 1973, to June 1975. They argue that since the Secretary had assessed those charges before he promulgated the regulations, under *Alyeska I* those charges also were invalid.

The parties have filed cross-motions for summary judgment on this claim, and we heard oral argument. We hold that the plaintiffs impermissibly split their cause of action between *Alyeska I* and the present case, and that they are barred from asserting the present claim.

I.

A. Because of our disposition of this case, we need only summarize its facts. In *Alyeska I*, we described the background in detail.

1. In 1969, the plaintiffs applied to the government for a right of way to build a pipeline to transport crude oil across Alaska. The plaintiffs and the government, however, encountered strong opposition to the pipeline. Litigation and the resulting court decisions threatened to delay its construction indefinitely.

To overcome the delay, Congress enacted Pub. L. No. 93-153, titles I & II, 87 Stat. 576 (1973), *codified in* 30 U.S.C. § 185 (1976) & 43 U.S.C. §§ 1651-55 (1976) (hereinafter referred to generally as the "TAPS Act"). The legislation removed the legal barriers to the construction of the pipeline by amending the law pertaining to pipeline rights of way in general, by eliminating further environmental impact studies of the trans-Alaska pipeline, and by limiting judicial review of the actions taken by the Secretary of the Interior (the "Secretary") in connection with the right of way for that pipeline.

In January 1974, the plaintiffs and the Secretary entered into an agreement granting the right of way ("Right-of-Way").

2. The TAPS Act requires that applicants for rights of way reimburse the government for its cost of processing the application. It also requires the holders of rights of way to reimburse the government for its costs of monitoring the "pipeline and related facility" and to pay annually to the government the fair rental value of the right of way. Until June 1, 1975, however, the Secretary had not promulgated regulations authorizing imposition of those costs and fees.

Under the Right-of-Way, the government billed the plaintiffs $38,930,438 in costs and fees through the "transition" quarter following fiscal year 1976. Of the total, more than $12 million, which the plaintiffs paid, represented costs incurred prior to the passage of the TAPS Act. The plaintiffs also paid another $13,691,980 for costs and fees accruing after the passage of the TAPS Act but before the promulgation of authorizing regulations in June 1975. The remainder of the costs and fees the plaintiffs paid are not germane to the present motions.

B. 1. In August 1978, the plaintiffs filed a petition in this court seeking a refund of certain of the costs and fees paid under the Right-of-Way. In February 1979, the plaintiffs amended their petition.

The amended petition contained three "claims." The first claim sought a refund of the entire $12,253,730 payment made to the government for costs incurred prior to the passage of the TAPS Act because no regulations authorized collection of that sum. The second claim (an alternative to the first) challenged the government's entitlement to particular items of that $12,253,730. The third claim challenged specific charges levied after passage of the TAPS Act. The third claim, however, did not challenge the government's authority to charge the plaintiffs for costs and fees after passage of the TAPS Act at a time when there were no authorizing regulations.

2. The plaintiffs moved for partial summary judgment on the first claim (or alternatively on the second claim) of the amended petition. The government moved to dismiss the petition on the ground that this court had no jurisdiction;

alternatively, the government cross-moved for summary judgment on the first claim. In *Alyeska I*, decided in June 1980, we granted the plaintiffs' motion for summary judgment on their first claim and denied the other motions. (The plaintiffs' second claim was rendered moot by that decision.)

We held that the government was not authorized to collect the $12,253,730 from the plaintiffs because no regulation authorized that action. We relied on the Independent Offices Appropriation Act, 31 U.S.C. § 483a (1976), which only allows the government to "impose a fair and equitable 'fee, charge or price' [for any "license, permit . . . or similar thing of value or utility"] . . . *if* [it] ha[s] 'authorized [such assessment] by regulation.' " 224 Ct. Cl. at 248, 624 F.2d at 1010. We rejected on alternative grounds the government's argument that the TAPS Act, not the Independent Offices Appropriation Act, determined the Secretary's authority to charge costs and fees to the plaintiffs.

First, we held that in the TAPS Act, Congress did not override the requirement in the Independent Offices Appropriation Act that the charges be assessed pursuant to regulation. 224 Ct. Cl. at 250-54, 624 F.2d at 1011-13. Second, we held that even if the TAPS Act had that effect, it could not be applied retroactively. *Id.* at 254-59, 624 F.2d at 1013-16. We noted that the TAPS Act

> has a significant prospective effect upon the plaintiffs: it makes them liable for the additional costs the United States incurred in connection with the construction and operation of the pipeline after November 1973. Indeed, plaintiffs do not dispute their obligation to reimburse the government for the latter costs.

Id. at 255, 624 F.2d at 1014.

We denied the government's motion for rehearing *en banc*. In October 1980, after the parties had stipulated to the amount of damages, this court entered partial judgment for the plaintiffs on the first claim.

3. After the partial judgment in *Alyeska I* was entered, the plaintiffs moved to amend their petition again in March 1981. The second amended petition added new third and fourth claims and designated the third claim as the fifth claim. The new third claim (the subject of the present motions) seeks recovery of the $13,691,980 costs and fees the government collected between the passage of the TAPS Act in November 1973 and the promulgation in June 1975 of regulations authorizing the collection of costs and fees, on the ground that the Secretary had no authority to do so except pursuant to regulation.

The defendant stated in writing that it did not oppose the amendment, and the trial judge permitted the amendment. *See* Rule 39(a).

4. The plaintiffs have moved for summary judgment on their new third claim, arguing that the rationale of *Alyeska I* indicates that even after the passage of the TAPS Act, it was unlawful for the government to charge to the plaintiffs costs and fees connected with the Right-of-Way in the absence of authorizing regulations. The government has cross-moved for summary judgment on this claim, basically rearguing *Alyeska I* and also attempting to distinguish the case. The government also urges that we should dismiss the third claim on the ground that the plaintiffs failed to exhaust their administrative remedies.

At oral argument the court raised the question whether the plaintiffs had split their cause of action between *Alyeska I* and the present action. The parties submitted supplemental briefs on that question.

II.

We hold that the plaintiffs impermissibly split their cause of action, so that they are barred from now asserting the third claim of their second amended petition.

A. In general, a final judgment on the merits of a claim (i.e., cause of action) precludes the same plaintiff from bringing against the same defendant a subsequent action on the same

claim, or any part of the claim that was, or reasonably could have been, brought in the initial action. *Container Transportation International, Inc. v. United States,* 199 Ct. Cl. 713, 717, 468 F.2d 926, 928 (1972) (and cases cited there); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1980) [hereinafter cited as RESTATEMENT]. Simply, a plaintiff may not split his claim or cause of action between different suits. *Everett Plywood Corp. v. United States,* 206 Ct. Cl. 244, 252, 512 F.2d 1082, 1087 (1975).

The plaintiffs' claim to a refund of all charges made under the Right-of-Way and incurred before the passage of the TAPS Act (the subject of *Alyeska I*) and their claim to a refund of all charges made under the Right-of-Way and incurred after passage of the TAPS Act but before promulgation of the authorizing regulations are parts of a single indivisible claim. They cannot be split.

1. A plaintiff's claim consists of all rights against a particular defendant "with respect to all or any part of the transaction, or a series of connected transactions, out of which the action arose." *Container Transport International,* 199 Ct. Cl. at 718, 468 F.2d at 929; *see also Everett Plywood Corp.,* 206 Ct. Cl. at 251-53, 512 F.2d at 1086-87; RESTATEMENT, *supra,* at § 24(1); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4407 (1981) [hereinafter cited as WRIGHT & MILLER].

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectation or business understanding or usage.

RESTATEMENT, *supra,* at § 24(2); *see also Container Transport International,* 199 Ct. Cl. at 718, 468 F.2d at 929.

Both the claim resolved in *Alyeska I* and the third claim presently before us arose out of the same transaction—the

government's assessment of the costs it incurred in connection with the Right-of-Way. Both claims rest upon the same legal theory—that the government's assessment of the costs was improper because made when there were no authorizing regulations. Since claim splitting cannot be justified on the ground that the two actions are based on different legal theories (*see e.g.*, 18 WRIGHT & MILLER, *supra*, at § 4411), *a fortiori*, it is improper where the actions involve the same legal theory.

It is consistent with the expectations of the parties to treat as a single claim all of the plaintiffs' claims based upon the government's assessment of costs without authorizing regulations made prior to the filing of the amended petition in 1979. In moving to amend their petition in 1981, the plaintiffs themselves recognized that "the claim set forth in the Second Amended Petition arose out of the 'conduct, transaction or occurrences' set forth in the original pleading" (quoting Rule 39(c)).

As this court has noted on several occasions, a single nondivisible contract—as the Right-of-Way contract was—normally gives rise to only one claim. *E.g., Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 254, 368 F.2d 847, 861 (1966). In certain circumstances, a part of a claim arising out of a nondivisible contract that is severable from the rest of the claim and that could not be asserted in the earlier suit may be the basis of a second suit. *Everett Plywood Corp.*, 206 Ct. Cl. at 251, 512 F.2d at 1087. However, "if the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later-filed action." *Id.* at 252, 512 F.2d at 1087; *see also* 18 WRIGHT & MILLER, *supra*, at § 4409.

When the plaintiffs first amended their petition in 1979 to include the claim addressed in *Alyeska I*, they were in possession of all the facts upon which the third claim of the second amended petition is based. The plaintiffs have offered no justification for their failure to raise the present claim before our decision in *Alyeska I*.

2. The plaintiffs argue, however, that the claim in *Alyeska I* and that presented here accrued at different times and so are

different claims. They rely primarily on *Commissioner v. Sunnen*, 333 U.S. 591 (1948). In *Sunnen*, the Supreme Court held that in the "federal income tax field" "[e]ach year is the origin of a new liability and of a separate cause of action." 333 U.S. at 598. Accordingly, a final judgment on the merits normally acts as a complete bar only as to subsequent actions on the same claim and the same tax year. *Id.* If the subsequent action involves a similar claim but a different tax year, the judgment bars only "those matters in the second proceeding which were actually presented and determined in the first suit." *Id.*

The decision in *Sunnen* was based largely on concerns that are peculiar to the "income tax field" and irrelevant here. As the Court pointed out, "[i]ncome taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action." *Id.* The Court also noted (*id.* at 599):

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class.

These same concerns are not present here. Each year for which the government assessed its expenses in connection with the pipeline did not involve a new liability, and there was no change in the significant facts or the controlling legal principles between pre- and post- November 1973. We hold only that *Alyeska I* bars the plaintiffs' new third claim which they could have asserted when they filed their first amended petition. The plaintiffs are not barred from bringing other claims, arising out of the Right-of-Way, that could not have been asserted in the first amended petition. *See Everett Plywood Corp.*, 206 Ct. Cl. at 251, 512 F.2d at 1087.

B. The plaintiffs argue, however, that since they did not file a new suit after *Alyeska I* to challenge the post-TAPS Act charges made without authorizing regulations, but merely amended their petition to add this claim, they did not split their claim at all. The plaintiffs further argue that the doctrine of claim preclusion "can usually only be urged in another action or proceeding" (quoting 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.405[1] p. 627 (1982)). The plaintiffs note that in *Alyeska I* the court entered only a partial summary judgment, and that 28 U.S.C. § 2517(b) (Supp. IV 1980) states that a partial judgment entered against the government discharges "only the matters described therein." Consequently, they conclude *Alyeska I* did not extinguish the claim they now seek to assert.

While the doctrine of claim preclusion "usually" does not bar other aspects of the same action that are not reached in the partial final judgment, there are exceptions. *See, e.g., Luff v. Luff*, 267 F.2d 643, 646 (D.C. Cir. 1959) (partial summary judgment of the district court, affirmed by the appellate court, barred the parties from raising a new related issue at the subsequent trial). This case is such an exception.

While a partial summary judgment "usually" does not bar other aspects of the action which are not the subject of the judgment, the court "usually" is aware, when it grants the partial judgment, of the other aspects of the plaintiff's action that the judgment does not resolve. *Cf. Luff*, 267 F.2d at 646. In *Alyeska I*, the court acted in the belief that the plaintiff was not challenging the government's right to impose Right-of-Way costs on the plaintiffs after the passage of the TAPS Act. The court believed that the partial judgment in *Alyeska I* would discharge all the plaintiffs' existing claims that involved a challenge to the Secretary's authority to impose charges in the absence of regulations.

We pointed out there that the "plaintiffs do not dispute their obligation to reimburse the government" for "the additional costs the United States incurred in connection with the construction and operation of the pipeline after November

1973" (*supra*, p. 4). The plaintiffs could have sought modification of the opinion to eliminate or change that statement. They did not do so. Instead they waited nine months, until after the judgment in *Alyeska I* had been entered, and then asserted the additional claim they could have asserted and litigated as part of the claims adjudicated by the earlier decision. The claim comes too late.

C. Finally, the plaintiffs argue that even if they split their claim, they should not be barred from asserting the second portion of it because the government acquiesced in the splitting. They point out that the government did not object to their proposed amendment of the petition to add the third claim and raised no question about splitting the claim in its briefs. After the court raised the issue at oral arguement, however, the government in its supplemental filing argued that the plaintiffs improperly had split their claim.

Furthermore, while a "main purpose" of the rule against claim splitting is "to protect the defendant from being harassed by repetitive actions based on the same claim" (RESTATEMENT, *supra*, at § 26 comment a), the rule also is designed to promote "judicial economy" and "convenience." *See Nager Electric Co.*, 177 Ct. Cl. at 254, 368 F.2d at 861. Although normally "the needs of judicial administration are, at best, of subsidiary value" (*Technograph Printed Circuits, Ltd. v. United States*, 178 Ct. Cl. 543, 555, 372 F.2d 969, 977 (1967)), when necessary, the court may raise the question of claim or issue preclusion *sua sponte*. *See, e.g., United States v. Pueblo of Taos*, 207 Ct. Cl. 53, 57-58, 515 F.2d 1404, 1406 (1975).

In this case, we raised the issue ourselves because of the adverse effect the plaintiffs' failure to include this claim in the first amended petition had upon the proper functioning of the judicial process. If the plaintiffs had not split their claim, both the pre- and post-TAPS Act aspects of it could have been resolved in the original *Alyeska I* proceeding. The effect of the plaintiffs' splitting of their claim has been to require the parties and the court to expend additional time and effort to consider unnecessarily an issue that could and should have been resolved in the earlier proceeding. One of the purposes of the rule against claim splitting is to prevent that situation.

CONCLUSION

The plaintiffs' motion for summary judgment is denied. The defendant's cross-motion for summary judgment is granted and the third claim of the plaintiffs' second amended petition is dismissed. The case is remanded to the Trial Division for further proceedings on the fourth and fifth claims of the petition.

* U.S. Government Printing Office: 361-518/1015

IN THE

UNITED STATES COURT OF CLAIMS

No. 384-78

ALYESKA PIPELINE SERVICE COMPANY, *et al.*

v.

THE UNITED STATES

Pleading and practice; partial final judgment; amended 28 U.S.C. § 2517(b); breadth of status of partial judgments.

Quinn O'Connell, attorney of record, for plaintiffs. *Ernest C. Baynard, III* and *Connole and O'Connell,* of counsel.

Steven A. Herman, with whom was *Acting Assistant Attorney General Anthony C. Liotta,* for defendant.

Before FRIEDMAN, *Chief Judge,* DAVIS and KUNZIG, *Judges.*

ORDER

Defendant has moved under Rule 152(b) (1) to modify the partial judgment entered in this case on October 31, 1980, so as to take that judgment out from the exclusion (in the latter portion of 28 U.S.C. § 1517(b)) of a judgment designated as a partial judgment from the general discharge provision of

section § 2517(b).[1] The Government contends that the exclusion (specifically added as an amendment to § 2517(b) by the Contract Disputes Act of 1978) is limited as an amendment to § 2517(b) only to cases brought under the Contract Disputes Act and therefore does not cover the present case. The court, however, does not agree with that reading of § 2517(b) which we construe as applicable to all cases in this court, including the present one, in which a partial judgment is entered after the effective date of the amendment.

The terms of the exclusionary portion of § 2517(b) —emphasized in footnote 1, *supra*—are all-compassing and general, not restricted in any way to cases under the Contract Disputes Act. Unlike subsection (a) of § 2517 which expressly refers to the Contract Disputes Act and excludes cases for which that statute requires a different disposition,[2] the exclusionary clause of subsection (b) does not refer to that Act or except only the cases under that statute from non-discharge. It is true that the exclusionary part of § 2517(b) was added by the Contract Disputes Act of 1978, Pub. L. 93-536, 92 Stat. 2390, but that amendment was in a separate section of that statute—section 14(f)—which, simply and generally, amended § 2517(b) to add the general exclusion of partial judgments from the general discharge requirement of the preexisting § 2517(b). Though the amendment is contained in the Contract Disputes Act, the amending section does not say that the amendment is restricted

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[1] The problem is that a part of the present case remains to be determined and defendant believes that payment of our judgment of October 31, 1980 (on the part of the case already determined) would be a full discharge of all the plaintiff's claims, under 28 U.S.C. § 2517(b) which now provides that payment of a final judgment of this court "shall be a discharge of the United States of all claims and demands arising out of the matters involved in the case or controversy, *unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged*". (emphasis added).

[2] Section 2517(a) provides:

Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

to cases under that Act, and there is nothing in section 14(f) of the Act to limit the broad amendment in that way. We are not persuaded, moreover, that Congress meant so to limit it. The bit of the legislative history on which defendant relies (Senate Report No. 95-1118, 1978 U.S. Code & Cong. Adm. News at 5235, 5268) says no more than that the new addition to § 2517(b) excludes cases under the Contract Disputes Act from discharge; it does not say that the new provision is not also to apply to other cases as well. Indeed, the report adds, very generally, that the amendments "will permit partial judgments where various claims, counterclaims, and cross claims can be segmented so that parties do not have to await the final disposition of all of the litigation before receiving judgment." That problem has long been a general and troubling one in this court, and we understand Congress to have met that general problem by a general provision applicable to all of our cases.

For these reasons, we think we had full authority to enter the judgment of October 31, 1980, as a partial judgment, and that the exclusionary provision of § 2517(b) prevents that partial judgment from discharging plaintiff's entire case. Defendant's motion for relief from judgment is accordingly denied.

IT IS SO ORDERED.

BY THE COURT

/s/ OSCAR H. DAVIS

Oscar H. Davis
Judge

March 6, 1981

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

December 15, 1982

GEORGE E. HUTCHINSON
CLERK

TELEPHONE: 633-6550
AREA CODE 202

Quinn O'Connell, Esq.
Connole & O'Connell
One Farragut Square South
Washington, D.C. 20006

Re: Case No. 384-78
ALYESKA PIPELINE SERVICE CO., *et al.* v.
THE UNITED STATES

Dear Mr. O'Connell:

The court today denied the petition for rehearing with suggestion for rehearing en banc. Circuit Judges Nichols, Kashiwa, Bennett, Smith and Rich took no part in the consideration of or decision on the petition.

Very truly yours,

/s/ GEORGE E. HUTCHINSON

df

cc: David M. Cohen, Esq.
Department of Justice

Office-Supreme Court, U.S.
FILED
APR 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1532

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALYESKA PIPELINE SERVICE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the former Court of Claims erred in holding that petitioners were barred from asserting their claim because they had impermissibly split their cause of action.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 9

Alyeska Pipeline Service Co. v. *United States*, 624 F.2d 1005 ..... 2, 3, 4, 5, 6, 8, 9, 10, 11

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 2

Arizona v. *California*, No. 8 Orig. (Mar. 30, 1983) 10

Brown v. *Chaffee*, 612 F.2d 497 9

Commissioner v. *Sunnen*, 333 U.S. 591 9

Electric Boat Co. v. *United States*, 81 Ct. Cl. 361, cert. denied, 297 U.S. 710 10

Everett Plywood Corp. v. *United States*, 512 F.2d 1082 ..... 9, 10

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 9

Jefferson Fourteenth Associates v. *Wometco de Puerto Rico, Inc.*, 695 F.2d 524 11

Montana v. *United States*, 440 U.S. 147 ..... 9, 11

Page

Cases—Continued:

Nager Electric Co. v. *United States*, 368 F.2d 847 10

Wilderness Society v. *Morton*, 479 F.2d 842, cert. denied, 411 U.S. 917 2

Statutes:

Contract Disputes Act of 1978, Section 14(f), Pub. L. No. 95-563, 92 Stat. 2390 4

Federal Courts Improvement Act of 1982, Section 139(k), Pub. L. No. 97-164, 96 Stat. 43 4

Independent Offices Appropriate Act, 1952, 31 U.S.C. 483a 3

Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.* 2

Tucker Act:

28 U.S.C. (& Supp. V) 1346 7
28 U.S.C. (& Supp. V) 1491 7

28 U.S.C. 2517(b) 4

28 U.S.C. (Supp. V) 2517(b) 4, 5, 6, 7, 8, 9

Miscellaneous:

Restatement (Second) of Judgments (1980) 9, 11

S. Rep. No. 93-207, 93d Cong., 1st Sess. (1973) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the former Court of Claims (Pet. App. 1a-11a) is reported at 688 F.2d 765.

JURISDICTION

The judgment of the former Court of Claims was entered on September 8, 1982. The Court of Appeals for the Federal Circuit denied a petition for rehearing on December 15, 1982 (Pet. App. 15a).[1] The petition for a writ of certiorari was filed on March 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]On October 1, 1982, after entry of judgment in the former Court of Claims, Congress enacted the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*, which abolished the Court of Claims and established the United States Claims Court and the United States Court of Appeals for the Federal Circuit. The petition for rehearing was filed in the latter court on October 22, 1982.

STATEMENT

1. Petitioners own and operate the Trans-Alaska Pipeline System. In 1969, petitioners applied to the government for a right-of-way to build a pipeline to transport oil across Alaska. Thereafter, opponents of the pipeline project instituted litigation which delayed the granting of the right-of-way.[2] In order to expedite the project, Congress in 1973 enacted the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.* ("TAPS Act").[3] On January 23, 1974, the Secretary of the Interior and petitioners entered into an "Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline." See *Alyeska Pipeline Service Co.* v. *United States*, 624 F.2d 1005, 1008 (Ct. Cl. 1980) ("*Alyeska I*"). The pipeline is now completed.

2. In November 1973, the Secretary billed petitioners $12,253,730 for costs incurred in connection with processing petitioners' right-of-way application. *Alyeska I, supra*, 624 F.2d at 1008. This amount, which was paid by petitioners, represents costs incurred prior to the passage of the TAPS Act. In addition, petitioners paid another $13,691,980 for costs incurred by the government after the enactment of the TAPS Act but before June 1975, when the Secretary promulgated regulations authorizing reimbursement for costs incurred by the government.[4]

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[2]See *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973); see also *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

[3]The TAPS Act was largely intended to supersede the outcome of the prior litigation. S. Rep. No. 93-207, 93d Cong., 1st Sess. 1-2 (1973).

[4]The government billed petitioners a total of $38,930,438 in costs and fees through the "transition" quarter following fiscal year 1976 (Pet. App. 3a). The present action, however, is concerned only with the $13,691,980 paid by petitioners for costs that accrued between the passage of the TAPS Act (November 1973) and June 1975.

3. After unsuccessfully seeking a refund from the Secretary for part of the amount paid, petitioners filed an action in the United States Court of Claims in August 1978 to recover monies which, they alleged, had been illegally exacted (Pet. App. 3a). Petitioners subsequently amended their petition in February 1979. As the court below noted, the amended petition contained three claims (*ibid.*; emphasis added):

> The first claim sought a refund of the entire $12,253,730 payment made to the government for costs incurred prior to the passage of the TAPS Act because no regulations authorized collection of that sum. The second claim (an alternative to the first) challenged the government's entitlement to particular items of that $12,253,730. The third claim challenged specific charges levied after passage of the TAPS Act. *The third claim, however, did not challenge the government's authority to charge the plaintiffs for costs and fees after passage of the TAPS Act at a time when there were no authorizing regulations.*

Petitioners and the government filed cross-motions for summary judgment on the first and second claims.[5] On May 28, 1980, the Court of Claims entered summary judgment in favor of petitioners on their first claim (*Alyeska I, supra*, 624 F.2d at 1018), holding that the government was without authority to collect the $12,253,730 because no regulation had authorized such action (*id.* at 1009-1010).[6] The court did not address the second claim because the sums sought therein were subsumed within the first claim (*id.* at 1007 n.2).

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[5]The government also unsuccessfully sought dismissal of the petition for lack of jurisdiction.

[6]The court relied on the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, for its finding that charges imposed for costs incurred in connection with the issuance of "license[s], permit[s]

4. In October 1980, partial final judgment was entered on the first claim (Pet. App. 4a). Thereafter, the government filed a motion for relief from judgment. The government's motion was grounded on a dispute over the applicability of language added in 1978 to the general discharge provision of 28 U.S.C. 2517(b), which describes the legal effect of payment of judgments rendered by the Court of Claims[7] on other claims arising out of the same case or controversy. Prior to the 1978 amendment, Section 2517(b) provided that payment of such judgments "shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy." Section 14(f) of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2390, amended the general discharge rule of Section 2517(b) by providing that it would apply "unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged." 28 U.S.C. (Supp. V) 2517(b).

The government argued that the qualifying language of 28 U.S.C. (Supp. V) 2517(b) applied only to cases brought under the Contract Disputes Act and, therefore, because the language did not apply to the present action, payment of the judgment on petitioners' first claim would be a full discharge to the United States of the remaining claims (*i.e.*, the third claim of the amended petition). The court rejected the government's argument and held that the qualifying

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* * * or similar thing[s] of value or utility" must be authorized by regulation (624 F.2d at 1009-1010). In so doing, the court rejected the government's argument that the TAPS Act was the governing statute with regard to the Secretary's authority to charge costs and fees (*id.* at 1010-1016).

[7]Since its amendment by Section 139(k) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 43, Section 2517 now refers to judgments rendered by the United States Claims Court. See note 1, *supra*.

language of 28 U.S.C (Supp. V) 2517(b) added in 1978 is not limited to cases brought under the Contract Disputes Act but instead applied in the instant action and thus prevented the government's payment of partial judgment from discharging the remainder of petitioners' case (Pet. App. 12a-14a). The partial final judgment was subsequently paid by the United States (Pet. 4).

5. After receiving judgment on their first claim, petitioners amended their petition again in March 1981. The amended petition, as described by the Court of Claims (Pet. App. 5a), added two claims which were not before the court when it decided *Alyeska I*:

> The second amended petition added new third and fourth claims and designated the third claim as the fifth claim. The new third claim (the subject of the present motions [for partial summary judgment]) seeks recovery of the $13,691,980 costs and fees the government collected between the passage of the TAPS Act in November 1973 and the promulgation in June 1975 of regulations authorizing the collection of costs and fees, on the ground that the Secretary had no authority to do so except pursuant to regulation.

Cross-motions for summary judgment were filed on the new third claim, with the petitioners arguing that the rationale of *Alyeska I*, barring collection by the government of application processing and monitoring costs in the absence of authorizing regulations, applies beyond the date of enactment of the TAPS Act up until the promulgation of such authorizing regulations (Pet. App. 5a). At oral argument, however, the court *sua sponte* raised the question whether petitioners should be barred from asserting their new third claim on the ground that petitioners had impermissibly split their cause of action. Both sides were allowed to submit supplemental briefs on the question.

6. In the decision under review, the Court of Claims granted the government's cross-motion for summary judgment and dismissed petitioners' new third claim (Pet. App. 1a-11a). The court reasoned that petitioners had improperly split their claim because (1) the new third claim and the first claim (the subject of *Alyeska I*) "are parts of a single indivisible claim" (*id.* at 6a); (2) both claims rest on the same legal theory and arose out of the same transaction; and (3) petitioners could have asserted their new third claim before the decision in *Alyeska I* (*id.* at 7a).

The court rejected petitioners' argument, based in part on 28 U.S.C. (Supp. V) 2517(b), that the rule against splitting a cause of action usually does not bar other aspects of the same action that are not reached in the partial final judgment. The court held that the instant case was an exception to the general rule because the court was not aware of the new third claim when it decided *Alyeska I* (Pet. App. 9a). The court noted (*ibid.*) that it had "believed that the partial judgment in *Alyeska I* would discharge all the [petitioners'] existing claims that involved a challenge to the Secretary's authority to impose charges in the absence of regulations." In light of the fact that the petitioners did not challenge the court's statement in *Alyeska I* that petitioners were not disputing their obligation to reimburse the government for costs incurred after the enactment of the TAPS Act, the court held that the new third claim, which *did* dispute petitioners' obligation to reimburse the government for post-TAPS Act costs, and which was not asserted until *after* judgment in *Alyeska I*, came too late (Pet. App. 9a-10a).

ARGUMENT

The decision of the Court of Claims is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

1. Petitioners erroneously assert (Pet. 5; footnote omitted) that this case presents the following question:

> In amending 28 U.S.C. § 2517(b), did Congress consent generally to the entry and payment of partial final judgments against the United States in all Tucker Act cases in the United States Claims Court, or did Congress merely consent to the entry and payment of such judgments in cases brought under the Contract Disputes Act of 1978?

Contrary to petitioners' assertion, the decision below (*Alyeska II*) does *not* raise this issue. As petitioners have acknowledged (Pet. 3, 7), the Court of Claims previously resolved the issue when, in denying the government's motion for relief from judgment in March 1981, it held that 28 U.S.C. (Supp. V) 2517(b) authorizes the entry and payment of partial final judgments in all cases before the court (Pet. App. 12a-14a). The Court of Claims expressly noted in *Alyeska II* (Pet. App. 9a) that final judgment on petitioners' first claim has been entered pursuant to 28 U.S.C. (Supp. V) 2517(b).[8]

2. The question that is presented by *Alyeska II* is whether petitioners should be barred from asserting their new third claim on the ground that, by not asserting the claim in conjunction with their first claim, they have impermissibly split their cause of action. Petitioners assume *arguendo* that a split cause of action is involved (Pet. 4 n.3),[9] but argue that

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[8]Because this case does not concern the issue of the extent to which the United States has consented to be sued under the Tucker Act, 28 U.S.C. (& Supp. V) 1346 and 1491, the cases cited by petitioners (Pet. 4-5) concerning that issue are inapposite.

[9]Although petitioners state that they are assuming *arguendo* that they split their cause of action, they nevertheless also argue that their new third claim "was for different amounts, paid at different times, to reimburse Respondent for different activities than in the first claim * * *" (Pet. 7). The Court of Claims, however, found the new third

28 U.S.C. (Supp. V) 2517(b) allows the splitting of a cause of action and the assertion of the new third claim.

It is undisputed that the qualifying language of 28 U.S.C. (Supp. V) 2517(b) allows claims to be pursued after a partial judgment has been entered in a case. The court in *Alyeska II* expressly recognized this effect of 28 U.S.C. (Supp. V) 2517(b) when it remanded the case for further proceedings on the fourth and fifth claims (see Pet. App. 11a). The fifth claim, which originally was the third claim of the first amended petition,[10] would have been discharged upon entry of judgment in *Alyeska I* but for the qualifying language of 28 U.S.C. (Supp. V) 2517(b).

Although 28 U.S.C. (Supp. V) 2517(b) prevents the discharge of pending claims that remain after partial final judgment has been entered, the Court of Claims correctly concluded (Pet. App. 5a-6a) that the statute does not entitle a party to bring "a subsequent action on the same claim, or any part of the claim that was, or reasonably could have been, brought in the initial action." As this Court has repeatedly held, a judgment on the merits "merges" all

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claim and the claim in *Alyeska I* to be parts of a single indivisible claim, arising out of the same transaction and resting upon the same legal theory (Pet. App. 6a-7a). The court held (*id.* at 7a) that "[i]t is consistent with the expectations of the parties to treat as a single claim all of the [petitioners'] claims based upon the government's assessment of costs without authorizing regulations made prior to the filing of the amended petition in 1979."

[10]Petitioners convey the impression that the third claim of their first amended complaint (Pet. 3) is the same third claim that is the subject of this case (*id.* at 4, 7). As previously noted, however, the claim before the court in this case was not raised until *after* judgment had been entered in *Alyeska I*. This distinction between the claims is critical: whereas petitioners, pursuant to 28 U.S.C. (Supp. V) 2517(b), may pursue the third claim of their first amended petition (now the fifth claim) after receiving partial final judgment on their first claim, they may not, for the reasons stated in *Alyeska II*, assert their new third claim at this stage in the proceedings.

claims theretofore accrued and precludes the parties from subsequently litigating further claims based on the same cause of action. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948). Petitioners could have asserted the third claim of their second amended complaint prior to the decision in *Alyeska I* but instead waited until after judgment had been entered. It is well settled that "if the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later-filed action." *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1087 (Ct. Cl. 1975).[11] The addition in 1978 of the qualifying language of 28 U.S.C. (Supp. V) 2517(b) does not permit petitioners to circumvent the rule against splitting a cause of action by presenting a claim that could and should have been raised earlier.

3. Petitioners also argue that the partial final judgment entered on their first claim should not bar the assertion of their new third claim because the rule against splitting causes of action is usually applied when the split claim is raised in a subsequent separate proceeding. The policy against multiple and piecemeal litigation, a principal rationale underlying the split cause of action rule (see *Brown* v. *Chaffee*, 612 F.2d 497, 504 (10th Cir. 1979)), is equally applicable to claims raised following partial judgment in a single case as to claims raised in a subsequent separate

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[11]The split cause of action rule is an application of the doctrine of res judicata, since res judicata, or "claim preclusion," prevents litigation of claims which could have been, but were not, litigated previously. See *Restatement (Second) of Judgments* §§ 18, 19, 24(1) (1980).

action.[12] If petitioners in the instant case had not split their cause of action, both claims could have been resolved in *Alyeska I*. Thus, as the Court of Claims noted (Pet. App. 10a), petitioners easily come within the rule against splitting causes of action:

> The effect of the [petitioners'] splitting of their claim has been to require the parties and the court to expend additional time and effort to consider unnecessarily an issue that could and should have been resolved in the earlier proceeding. One of the purposes of the rule against claim splitting is to prevent that situation.

This Court recently applied this rule in *Arizona* v. *California*, No. 8 Orig. (Mar. 30, 1983), slip op. 9-22, when it held that a prior determination of Indian water rights to the waters of the Colorado River, based upon a calculation of practicably irrigable acreage, precluded reopening and relitigation of the irrigable acreage issue. The Court's decision, which rests on principles of res judicata, includes language similar to the language of *Alyeska II* quoted above:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

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[12]Petitioners contend (Pet. 8-9 & n.7) that the decision below is inconsistent with the Court of Claims' prior decisions that hold that a plaintiff may avoid splitting his cause of action by amending his pleadings to include all claims in one action. In the cases cited, however, the additional claims were included by amendment of the petition *prior* to entry of judgment on the initial claim. See *Everett Plywood Corp.* v. *United States, supra; Nager Electric Co.* v. *United States*, 368 F.2d 847, 856-857 (Ct. Cl. 1966); *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361, 367-368 (1935), cert. denied, 297 U.S. 710 (1936).

Slip op. 13 (quoting *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979)). The Court also held that the fact that other matters were still pending when the United States moved to reopen the irrigable acreage issue did not undermine the finality of the prior irrigable acreage determination. Slip op. 11 n.7 (citing *Restatement (Second) of Judgments* § 13 comment e (1980), which states that "[a] judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

4. Petitioners' final argument is based on the fact that the court *sua sponte* raised the split cause of action issue at oral argument. Petitioners allege (Pet. 8) that they "never knew why the court viewed the cause of action as split until the court * * * issued its opinion * * *." Dismissal of the new third claim under such circumstances, petitioners assert (Pet. 8-9), constitutes a denial of procedural due process and calls for this Court to exercise its supervisory power to correct the alleged procedural deficiency.

The only authority cited by petitioners in support of this argument, *Jefferson Fourteenth Associates* v. *Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983), is inapposite. In that case the court of appeals held that the district court had deprived a third party plaintiff of its right to procedural due process by *sua sponte* dismissing its action on the merits without providing it an opportunity to develop the facts supporting its claim or to complete its pleadings. 695 F.2d at 526-527. In contrast, the merits of petitioners' new third claim were fully presented to the court below. In addition, petitioners were made aware at oral argument that the court was concerned with the issue of whether they had split their cause of action between *Alyeska I* and the present action (Pet. App. 5a). At the invitation of the court, petitioners submitted two briefs (one in reply to the government's brief) on the issue prior to the court's decision. Following the decision, petitioners sought

rehearing, contending that the court erred in ruling that petitioners had split their claim. The petition for rehearing was denied (Pet. App. 15a). In these circumstances, petitioners clearly were afforded due process in litigating their claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
BLAKE A. WATSON
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1532

ALYESKA PIPELINE SERVICE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
ARCO PIPE LINE COMPANY,
BP PIPELINES INC.,
EXXON PIPELINE COMPANY,
MOBIL ALASKA PIPELINE COMPANY,
PHILLIPS ALASKA PIPELINE CORPORATION,
SOHIO PIPE LINE COMPANY, and
UNION ALASKA PIPELINE COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY BRIEF

QUINN O'CONNELL*
ERNEST C. BAYNARD, III
CONNOLE AND O'CONNELL
One Farragut Square South
Washington, D.C. 20006
(202) 347-8300

HARRY G. BRELSFORD
ALFRED T. SMITH
ALYESKA PIPELINE SERVICE COMPANY
1835 South Bragaw Street
Anchorage, Alaska 99512
(907) 265-8221

**Counsel of Record*

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PETITIONERS' REPLY BRIEF

In the Brief of the United States in Opposition, Respondent raises several arguments for the first time. This reply brief addresses those arguments.

1. Respondent attempts to characterize this case as just another case that holds "if the claimant, before filing its first suit, is in possession of all of the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to the maintenance of the later-filed action." Brief in Opposition at 9. Here there were not multiple lawsuits, but only one lawsuit.

2. Petitioners amended their pleadings so as to include all of their claims in one lawsuit. This is the procedure the Court of Claims had held to be the proper method to avoid splitting a cause of action. Respondent argues that in all of the Court of Claims cases cited by Petitioners holding this to be the proper procedure, the pleadings were amended "*prior* to entry of judgment on the initial claim." (Emphasis in original.) Opposition Brief at 10, n. 12. This is a subtle misstatement. At the time those cases were decided, the statute involved in this case, 28 U.S.C. § 2517(b), had not yet been amended to authorize the Court of Claims to enter judgments on fewer than all of the claims presented in one lawsuit. Hence, prior to the amendment of § 2517(b) in 1978, there could not have been separate judgments at different times on separate claims within one lawsuit.

The only relevant difference between the line of cases cited by Petitioners and this case is that 28 U.S.C. § 2517(b) has now been amended to authorize the entry and payment of judgments on fewer than all of the claims in one lawsuit. Such a partial final judgment was entered in this case pursuant to the amended § 2517(b). Yet, subsequently, in acting upon a separate claim, the court below ignored that portion of the statute that prevents claims not described in the partial final judgment from being discharged.

3. Respondent appears to argue that 28 U.S.C. § 2517(b) really was applied here, but that this case falls within an exception to the saving clause of that statute. Opposition Brief at 8. There are no exceptions to the saving clause of the statute, unless this case has created one.

4. Respondent suggests that the decision below is consistent with *Arizona v. California*, No. 8 Orig. (March 30, 1983). This Court found in that case that the technical rules of preclusion or *res judicata* are not applicable in the course of the same proceeding. 51 U.S.L.W. 4325, 4329. Yet, it was the technical rules of preclusion that the court below invoked to bar Petitioners' claim as a result of an earlier partial final judgment in the same case. Thus, to the extent it is applicable at all, *Arizona v. California* is inconsistent with the decision below.

5. As is evident from the Petition for a Writ of Certiorari and the Brief of the United States in Opposition, this case presents significant, unanswered questions concerning both the scope and meaning of 28 U.S.C. § 2517(b), as amended in 1978. With the state of the law as it is now, a litigant who obtains a partial final judgment in the United States Claims Court does so at his peril. At some point this Court will have to answer the questions of first impression this case presents concerning the partial final judgment authority of the United States Claims Court. It would clearly be in the best interests of litigants in the United States Claims Court if those questions were answered now.

Respectfully submitted,

QUINN O'CONNELL*
ERNEST C. BAYNARD, III
CONNOLE AND O'CONNELL
One Farragut Square South
Washington, D.C. 20006
(202) 347-8300

HARRY G. BRELSFORD
ALFRED T. SMITH
ALYESKA PIPELINE SERVICE COMPANY
1835 South Bragaw Street
Anchorage, Alaska 99512
(907) 265-8221

Counsel of Record